

this state, now tenders her Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. PROCEDURAL HISTORY

1. On March 6, 2007, GasAmerica filed its Application for a New or Transfer Permit.
2. On May 6, 2007, the Local Board held a hearing and voted four (4) to zero (0) to deny the application.
3. On May 18, 2007, the ATC adopted the Local Board's recommendation.
4. On May 30, 2007, the Applicant timely filed its request for administrative review and request for appeal hearing within the fifteen (15) day deadline required by 905 IAC 1-36-2.
5. No remonstrators filed a petition for intervention, as required by 905 IAC 1-36-2.
6. On September 12, 2007, the Hearing Judge conducted a hearing regarding the Applicant's appeal.
7. On October 25, 2007, the Hearing Judge issued an Order Remanding Case to Local Board for Rehearing and Further Investigation for the limited purpose of allowing the Local Board to explore the issue of need and desire in the community.
8. On May 5, 2008 and June 2, 2008, the Local Board held hearings and voted four (4) to zero (0) to deny the application.
9. On June 17, 2008, the ATC adopted the Local Board's recommendation.
10. On July 2, 2008, the Applicant timely filed its request for administrative review and request for appeal hearing within the fifteen (15) day deadline required by 905 IAC 1-36-2.
11. No remonstrators filed a petition for intervention, as required by 905 IAC 1-36-2.

12. On September 23, 2008, the Hearing Judge conducted a hearing regarding the Applicant's appeal.

III. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

1. Dennis Spegal, Vice President of GasAmerica
2. Tammy Brown, District Manager (Northern Indiana) of GasAmerica
3. Linda McCune, Store Manager for GasAmerica
4. Brian Tuohy, Attorney for GasAmerica

B. The following individuals testified before the Local Board against the Applicant in this cause:

1. Kerry Sills, Remonstrator
2. Toby J. Sills, Remonstrator
3. Tom McGrath, Remonstrator
4. Ron Twibell, Remonstrator

C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

1. Affidavit of Stephanie White, with state-wide survey attached (Exhibit 1)
2. Affidavit of Stephanie White, with area-specific survey attached (Exhibit 2)

D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

1. Petition with signatures

IV. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Dennis Spegal, Vice President of GasAmerica
2. Brian Tuohy, Attorney for GasAmerica

B. No remonstrators appeared or testified before the Commission against the Applicant in this cause.

C. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Summary of Evidence In Support of the Need for Services at the Location of the Permit (Exhibit A)
2. Summary of Evidence In Support of the Desire of the Neighborhood or the Community to Receive Such Services (Exhibit B)
3. Summary of Evidence Showing Remonstrators' Objections to the Issuance of the Permit are Speculative and Ambiguous, and the Local Board's Decision was Arbitrary (Exhibit C)
4. Affidavit of Tami Brown, District Manager for GasAmerica Services, Inc., regarding specific requests by customers who shop at the Montpelier store for sales of beer and wine (Exhibit E)

D. No evidence was introduced and admitted before the Commission against the Applicant in this cause.

V. FINDINGS OF FACT

1. GasAmerica, located at 249 West Huntington, Montpelier, Indiana 47359, is an applicant for an ATC Type 115 beer and wine permit, Permit No. DL05-23124. (ATC File).

2. GasAmerica, an Indiana based company headquartered in 2700 West Main Street, Greenfield, Indiana, has existed for approximately twenty-four (24) years, being incorporated in the State of Indiana in 1983. (ATC file).

3. GasAmerica is in good standing with the Indiana Secretary of State. (ATC File).

4. GasAmerica operates ninety (90) convenience stores: seventy-six (76) in Indiana and fourteen (14) in Ohio. (LB Hearings, Appeal Hearing).

5. Of the ninety (90) convenience stores, GasAmerica has ATC permits to sell beer and wine in sixty-three (63) of these stores: forty-nine (49) stores in Indiana and fourteen (14) stores in Ohio. (LB Hearings, Appeal Hearing).

6. GasAmerica's store at 249 West Huntington, Montpelier, Indiana ("Montpelier store"), has been in operation for over nine (9) years. (LB Hearings, Appeal Hearing).

7. The Montpelier store is typical of other GasAmerica stores throughout Indiana. (LB Hearings, Appeal Hearing).

8. The Montpelier store is not located within two hundred feet (200') of a school or church. (Appeal Hearing, ATC File).

9. At the Montpelier store, GasAmerica sells thousands of different products which are typically sold in Indiana grocery stores, including but not limited to: dairy products, milk, cheese, eggs, meat and prepared food products, fresh fruit, canned goods, and tobacco products. (Appeal Hearing).

10. The expected sale of beer and wine will be considerably less than twenty-five percent (25%) of annual gross sales of all items sold. (Appeal Hearing).

11. Montpelier store sells the same or similar type of grocery products found at other stores that sell grocery products. (LB Hearings, Appeal Hearing).

12. The Montpelier store is a similar store and operation to other nearby GasAmerica stores in neighboring counties and towns that hold beer and wine permits, specifically the GasAmerica stores located in the counties of Madison and Delaware, and the towns of Columbia City, Angola and Auburn, Indiana. (LB Hearings, Appeal Hearing).

13. The similar GasAmerica stores that hold beer and wine permits, specifically the GasAmerica stores located in the counties of Madison and Delaware, and the towns of Columbia

City, Angola and Auburn, Indiana, are successful with the sale of beer and wine. (Appeal Hearing).

14. Many customers that purchase beer and wine at GasAmerica stores located in the counties of Madison and Delaware, and the towns of Columbia City, Angola and Auburn, Indiana, have asked to purchase beer and wine in the GasAmerica store located in Montpelier. (Appeal Hearing).

15. There are often specific requests by GasAmerica's customers in the Montpelier store for the sale of beer and wine. (LB Hearings, Appeal Hearing).

16. GasAmerica conducted a state-wide survey of its customers. This survey generated One Thousand Seven Hundred and Forty-Eight (1,748) responses. Of these responses, twenty-nine percent (29%) of the customers expressed a desire that GasAmerica sell beer and wine. (LB Hearings, Appeal Hearing).

17. GasAmerica conducted a second survey limited specifically to its customers in the Montpelier store. Out of the Seven Hundred (700) surveys sent, fifty-four (54) customers responded and eighteen percent (18%) of the customers expressed a desire that GasAmerica sell beer and wine. (LB Hearings, Appeal Hearing).

18. The Montpelier store is located in a commercial district and surrounded by businesses with commercial uses. (Appeal Hearing, ATC File).

19. There exist four (4) businesses that sell beer and wine in Montpelier that have been in business successfully for several years. (LB Hearings, Appeal Hearing).

20. There are five (5) alcohol beverage permits in operation in Montpelier. (LB Hearings, Appeal Hearing).

21. In order to compete on an equal footing with other stores and businesses in the Montpelier community that sell groceries and that also are allowed to sell alcoholic beverages, including other convenience stores, grocery stores, drugstores and retail stores, the Montpelier GasAmerica store needs an ATC permit to sell beer and wine. (LB Hearing, Appeal Hearing).

22. An ATC alcohol permit for GasAmerica to sell beer and wine is available in the town of Montpelier. (LB Hearings, Appeal Hearing, ATC file).

23. Certain individuals appeared at the LB Hearings to remonstrate against the granting of Permit No. DL05-23124 to GasAmerica. (LB Hearings, Appeal Hearing).

24. The remonstrators at the LB Hearings generally believed either there are sufficient numbers of outlets that sold alcohol or believed there were too many businesses that sold alcohol in the Montpelier area. (LB Hearings).

25. The Local board voted 4-0 to deny this permit. (LB Hearings, ATC File).

26. The extensive comments made by several members of the Local Board indicated that the basis of the Local Board's recommendation was insufficient need and desire in the community for the Applicant's services. (Local Board Hearing).

IV. CONCLUSIONS OF LAW

1. The ATC has jurisdiction over this matter pursuant to Ind. Code 7.1-1-2-2; Ind. Code 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code 7.1-3-1-4.

3. The ATC is commissioned to act upon proper application. *Id.*

4. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the ATC, including a public hearing. 905 IAC 1-36-7(a); Ind. Code 7.1-3-19-11(a).

5. The Hearing Judge may consider as evidence all documents in the ATC File, including the transcript of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a).

6. The Hearing Judge may also consider as evidence any codes and standards that have been adopted by an agency of this state. 905 IAC 1-36-8(e).

7. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noted in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code 4-21.5-3-27(d).

8. GasAmerica, located at 249 West Huntington, Montpelier, Indiana 47359, is an applicant for an ATC Type 115 beer and wine permit, Permit No. DL05-23124.

9. The proposed permit premises is not in a residential district as referred to in Ind. Code 7.1-3-19-13 and 905 IAC 1-18-1.

10. The proposed permit premises is more than two hundred feet (200') from a church or school. Ind. Code 7.1-3-21-11.

11. The Commission may issue a beer dealer's permit to an applicant who is the proprietor of a grocery store. Ind. Code 7.1-3-5-2(a).

12. The term "grocery store" means a store or part of a store that is known generally as a convenience store or food mart and is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks. Ind. Code 7.1-1-3-18.5 (a)(2)(B).

13. GasAmerica has established that the Montpelier store is a convenience store or food mart which is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks.

14. GasAmerica is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is well qualified to hold an alcoholic beverage permit under Indiana law. 950 IAC 1-27-1; Ind. Code 7.1-3-9-10.

15. GasAmerica is of good moral character and in good repute in the community in which it does business, and is qualified to hold the permit it seeks. 950 IAC 1-27-1; Ind. Code 7.1-3-4-2(a)(2)(A).

16. The Applicant is not disqualified from holding an ATC beer and wine grocery permit. Ind. Code 7.1-3-4-2; Ind. Code 7.1-3-5-2; Ind. Code 7.1-3-15-2.

17. In determining whether to issue a permit, the Commission may consider the geographic desirability of the proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

18. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

19. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

20. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).

21. The Commission has discretion to issue or deny an application for a retail liquor permit. Ind. Code 7.1-3-19-1; *Indiana Alcoholic Beverage Comm'n v. State ex rel. Harmon*, 269 Ind. 48, 379 N.E.2d 140 (1978). The Commission may investigate an application for such a permit in whatever manner it deems best and may grant or refuse the application "as it deems the

public interest shall be served best." Ind. Code 7.1-3-19-10; *Harmon*, 269 Ind. 48, 379 N.E.2d 140.

22. The Commission must deny an application for a permit when a majority of the members of a local board recommend that the permit not be granted unless the commission determines, after *de novo* review, that to follow the recommendation would be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Ind. Code 7.1-3-19-11(a); *Taylor Drug Stores, Inc. v. Indiana Alcoholic Beverage Comm'n*, 497 N.E.2d 932 (Ind. Ct. App. 1986).

23. Applicant contends the decision of the Local Board to deny the permit was arbitrary and capricious and was not supported by substantial evidence. (Appeal Hearing).

24. An administrative agency action is arbitrary and capricious "only where there is no reasonable basis for the action." *Ind. Civil Rights Comm'n v. Delaware County Cir. Ct.*, 668 N.E.2d 1219, 1221 (Ind. 1996). An arbitrary and capricious decision is "patently unreasonable," and "lacks any basis which might lead a reasonable person to the same conclusion." *City of Indianapolis v. Woods*, 703 N.E.2d 1087, 1091 (Ind. Ct. App. 1998). The burden of proving that the administrative action in question was arbitrary or capricious falls on the party attempting to reverse the decision. *Forrest v. Sch. City of Hobart*, 498 N.E.2d 14, 17 (Ind. Ct. App. 1986).

25. The substantial evidence standard is met if a reasonable person could conclude that the evidence and the logical inferences there from are of such a substantial character and probative value as to support the administrative determination. *Indiana Alcoholic Beverage Comm'n v. Edwards*, 659 N.E.2d 631 (Ind. Ct. App. 1995).

26. The decision of the Local Board to deny the permit was based upon substantial evidence and was neither arbitrary nor capricious. The Local Board heard testimony and reviewed petitions submitted by the Applicant and Remonstrators regarding the community's need or desire for the grant of a permit to the Applicant. Comments made by members of the Local Board indicated they felt there was not a need for alcohol to be served at the proposed permit premises. Under 905 IAC 1-27-4, the Local Board must consider community need and desire in reaching their decision. The Local Board considered the evidence before it and based its decision on that evidence. (LB Hearing).

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the recommendation of the Local Board is affirmed and the appeal of Applicant, Gas America Services, Inc., for the Permit Number DL05-23124, is hereby DENIED.

DATED: October 28, 2008

U-Jung Choe, Hearing Judge